

STATE OF VERMONT
PUBLIC SERVICE BOARD

Docket No. 6972

Petition of Central Vermont Public Service Corporation)
for approval of a Cost, Maintenance and Use of Poles)
Agreement with Shoreham Telephone Company, Inc.)

Order entered: 5/23/2005

I. INTRODUCTION

On November 5, 2001, Central Vermont Public Service Corporation ("CVPS") filed a tariff entitled "Rules and Regulations for Pole Attachment Services" (Tariff Filing No. 4657). This tariff was filed in response to the Public Service Board's ("Board") newly adopted Rule 3.700, which regulates rates and terms for rental of space on utility poles by other attaching entities, including cable television companies and telephone companies. CVPS's tariff was allowed to go into effect subject to an investigation that was opened in Docket 6605.

Shoreham Telephone Company, Inc. ("Shoreham"), is an incumbent local exchange carrier ("ILEC") serving several towns in West-Central Vermont. Shoreham desires to continue to attach facilities to poles owned by CVPS; those poles are subject to Rule 3.700, but neither the Rule nor CVPS's tariff provides rates for ILECs. On June 3, 2004, CVPS petitioned the Board to set an attachment rate for Shoreham pursuant to Rule 3.704(C).

On March 30, 2005, Shoreham and CVPS filed a stipulation ("Stipulation") that settles "all factual and legal matters presently in dispute in this matter." The Stipulation provides that the Board may make findings of fact and waives service of a proposed decision pursuant to 3 V.S.A. § 811, provided such findings and proposal are consistent with its terms. In addition, on May 3, 2005, the Department filed a letter stating that it has no objection to Board approval of the Stipulation and that it also waives service of a proposal for decision that is consistent with it. Therefore, based upon the pleadings and the Stipulation,¹ and pursuant to 30 V.S.A. § 8, I present the following findings of fact and conclusions of law to the Board.

1. All of the findings below are founded upon the recitations of the Stipulation.

II. FINDINGS

1. CVPS has a pole attachment tariff on file with the Board. However, the rates charged under that tariff are presently being investigated in Docket 6605. Further, the tariff does not include a pole-rental rate to be paid by an ILEC.

2. CVPS and Shoreham had an agreement, commencing in 1956, respecting the rates, terms, and conditions for Shoreham's attachments to CVPS's poles. That agreement was terminated by CVPS on May 2, 2004. Since that termination, the attachments by Shoreham have not been covered by either an agreement or a tariff.

3. Since the termination of the agreement, Shoreham has continued to have its facilities attached to CVPS's poles, and CVPS has allowed those attachments pending resolution of the issues in this docket.

4. The Stipulation provides two rates for Shoreham's attachments. For attachments made or existing between May 2, 2004, and December 31, 2006, Shoreham will pay the rate of \$11.25 per pole per year. For attachments made or existing after December 31, 2006, the rate will be the rate set for ILECs in CVPS's pole attachment tariff on file with the Board, as it may be amended from time to time. However, if CVPS does not have an approved attachment rate for ILECs in effect as of January 1, 2007, the \$11.25 rate will remain in effect until CVPS does have such an approved rate.

5. The terms and conditions for Shoreham's attachments, other than the rate, shall be the same as the terms and conditions established in CVPS's current pole attachment tariff, as may be amended from time to time.

6. Within 10 days of a Board order in this Docket, CVPS will present a bill to Shoreham for payment of the amount due for pole attachments between May 2, 2004, and the month ended before the date of such order, and Shoreham will pay that bill within another 10 days.

7. The Stipulation represents a bottom-line settlement and is not precedential in any action except one to enforce the Stipulation. Disputes arising under the Stipulation are to be resolved by the Board.

III. DISCUSSION

The parties to the Stipulation submit that the Board may approve the Stipulation and resolve this Docket in accordance with Rule 3.704(C), and that approval under Rule 3.704(A)(1) and 30 V.S.A. § 229 is not needed. They have, nonetheless, in the event the Board considers Rule 3.704(A)(1) and 30 V.S.A. § 229 to be applicable, requested approval under those provisions as well. Section 229 prohibits a public service company from deviating from the rates for service in its tariffs, and from entering into a contract, agreement, or arrangement to provide a product or service not covered by its tariffs, without approval from the Board. The final sentence of Section 229 demands that such deviation or contract be for a definite term. The argument of the parties is, presumably, that the Stipulation is not a contract but is, instead, a settlement of a case before the Board pursuant to Rule 3.704(C), which states

When a pole attachment contract has expired . . . and an Attaching Entity cannot reach agreement on a rental rate with the Pole-Ownning Utility, any party may petition the Board to set an attachment rate.

That language describes the situation now presented, and would appear to obviate the need for approval under Section 229. However, the Board cannot circumvent a statutory provision with a Rule, and the rate set under the Stipulation may, in fact, fall under the proscription of Section 229. Rather than leave the legality of the parties' agreement in doubt, I recommend that the Board approve the Stipulation under both Rule sections 3.704(A) and (C). In order to give approval under 704(A) (which references Section 229) it is necessary for the agreement to be time-limited. The Stipulation calls for a rate of \$11.25 per pole per year until December 31, 2006, after which the rate is to be controlled by the tariff; provided, however, that, if there is no tariff in effect that would apply to Shoreham, then the \$11.25 shall remain in effect. I recommend that the Board approve this latter provision but that it expire on December 31, 2007. If there is still no approved tariff that can be applied to Shoreham as of late 2007, the parties should reapply to the Board for an additional, definite term. With that minor change, I recommend that the Board approve the Stipulation under both Rule 3.704(C) and Rule 3.704(A)(1) and 30 V.S.A. § 229.

IV. CONCLUSION

The Stipulation appears to be a reasonable compromise of the parties' interests, and sets a rate that seems neither unreasonably high or low. I recommend that the Board accept the Stipulation and that this Docket be closed. Since this Proposal for Decision is consistent with the provisions of the Stipulation, it has not been served on the parties to this proceeding in accordance with 3 V.S.A. § 811.

Dated at Montpelier, Vermont, this 18th day of May, 2005.

s/John P. Bentley
John P. Bentley, Esq.
Hearing Officer

V. ORDER

IT IS HEREBY ORDERED, ADJUDGED AND DECREED by the Public Service Board of the State of Vermont that:

1. The Findings, Discussion, and Conclusions of the Hearing Officer are adopted.
2. The Stipulation between CVPS and Shoreham filed on March 30, 2005, is accepted, pursuant to Rule 3.704(A)(1) and (C) and 30 V.S.A. § 229, effective by its terms but not beyond December 31, 2007.
3. This Docket shall be closed.

Dated at Montpelier, Vermont, this 23rd day of May, 2005.

<u>s/James Volz</u>)	
)	PUBLIC SERVICE
)	
<u>s/David C. Coen</u>)	BOARD
)	
)	OF VERMONT
<u>s/John D. Burke</u>)	

OFFICE OF THE CLERK

FILED: May 23, 2005

ATTEST: s/Susan M. Hudson

Clerk of the Board

NOTICE TO READERS: This decision is subject to revision of technical errors. Readers are requested to notify the Clerk of the Board (by e-mail, telephone, or in writing) of any apparent errors, in order that any necessary corrections may be made. (E-mail address: Clerk@psb.state.vt.us)

Appeal of this decision to the Supreme Court of Vermont must be filed with the Clerk of the Board within thirty days. Appeal will not stay the effect of this Order, absent further Order by this Board or appropriate action by the Supreme Court of Vermont. Motions for reconsideration or stay, if any, must be filed with the Clerk of the Board within ten days of the date of this decision and order.